SPORT RESOLUTIONS (UK)

NATIONAL ANTI-DOPING PANEL

SR/NADP/66/2018

IN THE MATTER OF APPEAL PROCEEDINGS
BROUGHT UNDER THE ANTI-DOPING RULES OF
THE INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONs

Before:
Charles Hollander QC (Chair)
Professor Gordon McInnes
Blondel Thompson

B E T W E E N:

JOANNA BLAIR ***Appellant***

and

UK ANTI-DOPING (UKAD) ***Respondent***

DECISION

NATIONAL ANTI-DOPING PANEL

Introduction

1. This is an appeal by Joanna Blair ('the Athlete') against the decision of the anti-doping tribunal in *UKAD v Blair* (SR/NADP/1010/2017) handed down on 23 February 2018 ('the First Instance Decision').

2. On 24 June 2017, the Athlete provided a sample for an Out-of-Competition test. Analysis of that sample returned an Adverse Analytical Finding for the presence of a metabolite of metandienone. Metandienone is listed as a Prohibited Substance under **section S1.1(a)** of the **2017 World Anti-Doping Agency 2017 Prohibited List**; it is a Non-Specified Substance that is prohibited at all times.

3. Pursuant to **Article 2.1.2 of the International Association of Athletics Federations Anti-Doping Rules ('IAAF ADR')**, it is '*sufficient proof of an Anti-Doping Rule Violation under Article 2.1*' that, inter alia, analysis shows the '*presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample*'.

4. Accordingly, UKAD charged the Athlete with an Anti-Doping Rule Violation on 20 July 2017. The Athlete, through her representative, admitted the violation on 27 July 2017. The issue before the first instance tribunal, therefore, was the appropriate sanction.

5. Before the first instance tribunal, it was the Athlete's case that the metandienone had been introduced into her system through a creatine supplement which had been contaminated.

6. **Article 10.2 of the IAAF ADR** provides:

> **10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method**
>
> The period of Ineligibility imposed for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6 that is the Athlete or other Person's first anti-doping

offence shall be as follows, subject to potential reduction or suspension pursuant to Article 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

(a) The Anti-Doping Rule Violation does not involve a Specified Substance, unless the Athlete or other Person establishes that the Anti-Doping Rule Violation was not intentional.

(b) The Anti-Doping Rule Violation involves a Specified Substance and the Integrity Unit establishes that the Anti-Doping Rule Violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

7. **Article 10.5 of the IAAF ADR** provides:

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for an Anti-Doping Rule Violation under Article 2.1, 2.2 or 2.6:

(a) […]

(b) Contaminated Products.

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the degree of Fault of the Athlete or other Person.

8. The **IAAF ADR Definitions** provide that a Contaminated Product is:

'A product that contains a Prohibited Substance that is not disclosed on the product label or in the information available in a reasonable Internet search'.

The First Instance Decision

9. The first instance tribunal held at [46] that the Athlete bore the burden of proof to show that the Anti-Doping Rule Violation was not 'intentional' (as per **IAAF ADR Article 10.2**) or was the result of consuming, with No Significant Fault or Negligence, a Contaminated Product from which the Prohibited Substance came (as per **IAAF ADR Article 10.5**).

10. The tribunal stated at [50] that there were four possible explanations for how the metandienone came to be introduced into the creatine supplement:

    (1) contamination during manufacture;

    (2) introduction after the Adverse Analytical Finding;

    (3) introduction before the Adverse Analytical Finding by a third party; and

    (4) introduction before the Adverse Analytical Finding by the Athlete.

    It was recognised that the second possibility was of no assistance to the Athlete, as it would not explain the metandienone in her sample. It was also held at [51] that the third possibility was '*wholly improbable*'.

11. The tribunal proceeded to hold at [55] that the Athlete failed to prove the first possibility:

    > 'On the available evidence we are not satisfied that the PhD creatine was probably contaminated with metandienone during the manufacturing process'

    The tribunal accordingly concluded that the Athlete could not rely on either **IAAF ADR Article 10.2** or **Article 10.5**; they therefore imposed a period of Ineligibility of four years, commencing on 20 July 2017.

The Appeal

12. By a Notice of Appeal dated 15 March 2018, the Athlete appealed under the **2015 Rules of the National Anti-Doping Panel, Article 13**.

13. The grounds of appeal were as follows:

13.1. The first instance tribunal erred in treating the evidence of Kelly Eagle, Vicky Waller, and Dr Hannah Pritchard as '*militat*[ing] *against*' the conclusion that the creatine supplement had been contaminated during manufacture; and

13.2. The first instance tribunal erred in holding that, in order to engage **IAAF ADR Article 10.2** or **Article 10.5**, the Athlete was required to prove how the creatine supplement came to be contaminated.

Nature of the Appeal

14. A prior question arose as to the proper nature of the appeal. Under **Article 13 of the Rules of the National Anti-Doping Panel**, each party has a right to appeal the decision of a tribunal. **Article 13.4.1** provides that the appeal may proceed by way of a de novo rehearing where this is '*required in order to do justice'*; **Article 13.4.2** provides that '*in all other cases, the appeal… shall be limited to a consideration of whether the decision being appealed was erroneous'.*

15. The Athlete, by her Notice of Appeal, sought a rehearing under **Article 13.4.1**. At a directions hearing on 23 March 2018, the Chairman of the Appeal Tribunal ordered that there be a preliminary hearing on the proper nature of the appeal. A preliminary ruling was handed down on 26 April 2018 in which the Chairman held that the primary ground of appeal, based on location of the burden of proof, was concerned with whether the first instance tribunal erred in law. The Chairman directed that the appeal should be heard first by way of review under **Article 13.4.2**, but that, depending on the result of appeal, it might subsequently be necessary to order a rehearing.

16. As will become apparent, the view of the appeal tribunal is that the first instance tribunal did not err in its application of the law. It has, therefore, not become necessary to order a rehearing.

The Burden of Proof

17. Mr Torrance submitted before us that first instance tribunal erred in law in placing the onus of proving that the creatine supplement was contaminated during manufacture on the Athlete.

18. Mr Torrance placed considerable reliance on the decision in *UCI & WADA v Alberto Contador Velasco & RFEC* (CAS 2011/A/2384 & 2386), which he submitted demonstrated a principle that, when a party is called upon to prove 'negative facts', procedural fairness requires that the other party must proffer some explanation as to why the former's account is incorrect. He argued that – in application of both **IAAF ADR Article 10.2** and **Article 10.5** - the Athlete was called upon, in effect, to prove that she had not introduced the metandienone into the creatine supplement herself, and that this was a 'negative fact'. Accordingly, he submitted, the principle in *Contador* was engaged, such that UKAD were obliged to make some positive case that the Athlete *had* adulterated the creatine supplement.

19. Mr Torrance also relied on statements in *Maurico Fiol Villaneuva v Fédération Internationale de Natation* (CAS 2016/A/4534) and *Arijan Ademi v Union of European Football Associations* (CAS 2016/A/4676) for the proposition that, in cases where an athlete has ingested a Contaminated Product, the athlete does not need to show how the product came to be contaminated in order to discharge their burden of showing that the Anti-Doping Rule Violation was not intentional. Mr Torrance strongly urged the appeal tribunal that the contrary rule would be unfair to athletes, as proof of the source of contamination may require expense beyond the means of many athletes – especially amateur athletes – as well as the co-operation of third parties such as the manufacturers, which may not be forthcoming.

20. The starting point must be that general burden of proof under both **IAAF ADR Article 10.2** and **Article 10.5** is placed on the athlete. **Article 10.2.1(a)** states that the four-year ineligibility applies '*unless the Athlete or other Person establishes that the Anti-Doping Rule Violation was not intentional'.* Similarly, **IAAF ADR Article 10.5(b)** is engaged '*where the Athlete or other Person can establish No*

Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product'.

21. The view of the appeal tribunal is that this question was settled by the decision of the appeal tribunal in *UKAD v Buttifant* (SR/NADP/508/2016). There the appeal tribunal considered the decisions of two different first instance tribunals which had taken slightly different approaches to article 10.2. One of those was the first instance tribunal in *Buttifant* itself, of which two of the present appeal tribunal members were party. The appeal tribunal in *Buttifant* surveyed the authorities relevant to **Article 10.2**. In particular, the appeal tribunal considered the *Contador* decision. They said:

> 27. 'Article 10.2.3 does allow a tribunal to consider all relevant evidence in assessing whether the violation was intentional, but the most important factor will be the explanation or explanations advanced by the athlete. There must be an objective evidential basis for any explanation for the violation which is put forward. We reject the argument put by the Respondent that the athlete's contention that he does not know how the prohibited substance entered his body is consistent with an intention not to cheat and that the ultimate issue is the credibility of the athlete. The logic of the argument would be that where the only evidence is that of the athlete who, with apparent credibility, asserts that he was not responsible for the ingestion then on the balance of probability the athlete has proved that he did not act intentionally. Article 10.2.3 requires an assessment of evidence about the conduct which resulted or might have resulted in the violation. A bare denial of knowing ingestion will not be sufficient to establish a lack of intention.
>
> 28. In summary, in a case to which article 10.2.1.1 applies the burden is on the athlete to prove that the conduct which resulted in a violation was not intentional. Without evidence about the means of ingestion the tribunal has no evidence on which to judge whether the conduct of the athlete which resulted in the violation was intentional or not intentional. There is no express requirement for an athlete to prove the means of ingestion but there is an evidential burden to explain how the violation occurred. If the athlete puts forward a credible explanation then the tribunal will focus on that conduct and determine on the balance of probabilities whether the

athlete has proved the cause of the violation and that he did not act intentionally.

29. There may be wholly exceptional cases in which the precise cause of the violation is not established but there is objective evidence which allows the tribunal to conclude that, however it occurred, the violation was neither committed knowingly nor in manifest disregard of the risk of violation. In such a case the conduct under examination is all the conduct which might have caused or permitted the violation to occur. These rare cases must be judged on the facts when they arise.'

22. Given that the decision of the appeal tribunal in *Buttifant* is precisely on point, and considered the approach to be taken after a review of the relevant authorities, we consider it is appropriate for us to follow that approach.

23. This analysis is also in line with the *Ademi* case which Mr Torrance cited. It was stated in that case that '*the Panel can envisage the theoretical possibility that it might be persuaded by a Player's simple assertion of his innocence… even if such a situation must inevitably be extremely rare*'. This case is not, in the view of the appeal tribunal, such a case.

24. Although the preceding authorities principally considered the burdens of proof under **IAAF ADR Article 10.2**, the appeal tribunal considers that the equivalent analysis must apply in respect of **IAAF ADR Article 10.5**. Indeed, during oral argument it did not appear that the parties sought to draw any distinction between the two provisions.

25. We also note that the decisions in *WADA v Stanic & Swiss Olympic Association* (CAS 2006/A/1130) and *Rybka v UEFA* (CAS 2012/A/2759) appear to apply the same analysis in relation to questions of negligence as opposed to intention. The discussion in *IWBF v UKAD & Gibbs* (CAS 2010/A/2230) was also helpful in reinforcing the correctness of this approach.

26. The appeal tribunal cannot accept the proposition that *Contador* creates any general proposition that the proof of 'negative facts' operates to reverse, to any extent, the

burden of proof under **IAAD ADR Article 10.2** or **Article 10.5**. Such a proposition would be contrary to the express and clear wording of said Articles.

27. We recognise that **Article 10.2** has the potential to cause considerable hardship to an athlete unable to explain the presence of a prohibited substance. It is not for this appeal panel to comment on IAAF Anti-Doping Rules which are applicable across the entire sporting community. But, it is relevant to repeat what the tribunal said in UKAD v *Songhurst* (SR/0000120248):

> 'in the normal course it is not to be expected that prohibited steroids are found in the body of an athlete. In any normal case knowledge concerning how the substance came to be in the body is uniquely within the knowledge of the athlete and UKAD can only go on the scientific evidence of what was found in the body. The scientific evidence of a prohibited substance in the body is itself powerful evidence, and requires explanation. It is easy for an athlete to deny knowledge and impossible for UKAD to counter that other than with reference to the scientific evidence. Hence the structure of the rule.'

The Evidence of Kelly Eagle, Vicky Waller, and Dr Hannah Pritchard

28. Mr Torrance submitted that the first instance tribunal was not entitled to place weight on the evidence of Kelly Eagle, Vicky Waller, and Dr Hannah Pritchard in holding that the Athlete had failed to prove that the contamination had occurred during manufacture. He contended that their statements merely demonstrate a chain of custody by which a test sample of creatine from the same batch as that taken by the Athlete came to be tested by UKAD.

29. These three witnesses were not required to attend for cross-examination.

30. At [31] of the First Instance Decision, the first instance tribunal note that Kelly Eagle's evidence was that '*To the best of our knowledge, none of our materials contain anabolic steroids, however we cannot state this categorically as we do not test for this*'. Mr Torrance placed considerable reliance on the second limb of this statement. Similarly, at [32] of the First Instance Decision, the first instance

tribunal note Dr Hannah Pritchard's evidence that Cambridge Communities Limited '*is registered with Informed Sport and its premises are routinely audited and swab-tested* "*to minimise inadvertent contamination"'* and that such registration '*meant the CCL site was "tested to show that it has appropriate controls in place to minimise cross-contamination"'*.

31. This is evidence which is capable of speaking to whether contamination during manufacture occurred, and the first instance tribunal was reasonably entitled to place such weight on it as it saw appropriate. We do not think the first instance tribunal gave this evidence greater weight than it deserved. It follows that the appeal tribunal does not accept Mr Torrance's submission.

The Decision of the First Instance Tribunal

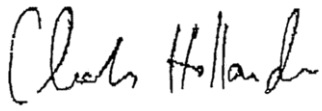
32. After setting out the facts and the submissions, the first instance tribunal cited the relevant paragraphs from *Buttifant*, pointed out that for the athlete to establish that there was metandienone in the PhD creatine *after* the AAF did not establish whether the contaminant was present prior to sealing the tub and considered the various possibilities logically, reviewing the evidential basis or probabilities on the available material in support or against each. We can discern no error in the approach of the first instance tribunal at [49] - [59].

Further evidence

33. We were asked to adjourn the appeal hearing one working day in advance because of the possibility of further evidence being available in the athlete's favour hereafter. We refused an adjournment. One year after the charge was brought, no further evidence has been forthcoming. We do not consider it would be appropriate to delay this decision because of that possibility.

Conclusion

34. For these reasons the appeal is dismissed.



Charles Hollander QC

On behalf of the Tribunal

30 July 2018

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